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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA  
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12                  GERALD R TARUTIS as guardian ad  
13                  litem for A.B., a minor, and SHANI  
14                  BERRY,  
15

16                  Plaintiffs,

17                  v.  
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19                  WAL-MART STORES, INC., and  
20                  SPAULDING LIGHTING, INC.,  
21

22                  Defendants.

23                  CASE NO. C12-5076 RJB  
24

25                  ORDER GRANTING PLAINTIFF'S  
26                  MOTION TO DISMISS WITHOUT  
27                  PREJUDICE OF CLAIMS AGAINST  
28                  SPAULDING LIGHTING, INC. AND  
29                  DENYING AS MOOT DEFENDANT  
30                  SPAULDING LIGHTING'S MOTION  
31                  FOR SUMMARY JUDGMENT  
32

33                  This matter comes before the Court on Defendant Spaulding Lighting's (Spaulding)  
34 motion for summary judgment. Dkt. 33. The Plaintiff Gerald R. Tarutis, as guardian ad Litem  
35 for minor A.B. (Tarutis), filed a response stating that Plaintiff Tarutis "does not present evidence  
36 to controvert Spaulding Lighting's Motion." Dkt. 43 p. 1. Spaulding filed a reply indicating that  
37 its motion was unopposed and requesting dismissal of Plaintiff's claims with prejudice. Dkt. 46.  
38 On the same date Spaulding filed its reply, Plaintiff filed a request pursuant to Fed. R. Civ. P.  
39 41(a)(2) for voluntary dismissal without prejudice of the claims against Spaulding. Dkt. 47.  
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41 ORDER GRANTING PLAINTIFF'S MOTION TO  
42 DISMISS WITHOUT PREJUDICE OF CLAIMS  
43 AGAINST SPAULDING LIGHTING, INC. AND- 1  
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1                   **SUMMARY JUDGMENT AND DISMISSAL WITHOUT PREJUDICE**

2                 Federal Rule of Civil Procedure 41(a)(2) allows a plaintiff, pursuant to an order of the  
 3 court, and subject to any terms and conditions the court deems proper, to dismiss an action  
 4 without prejudice at any time. See Fed. R. Civ. P. 41(a)(2); *Stevedoring Servs. of Am. v. Armilla*  
 5 *Int'l B.V.*, 889 F.2d 919, 921 (9th Cir.1989). When ruling on a motion to dismiss without  
 6 prejudice, the district court must determine whether the defendant will suffer some plain legal  
 7 prejudice as a result of the dismissal. *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001); *Hyde*  
 8 & *Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir.1994).

9                 Legal prejudice does not result merely because a defendant will be inconvenienced by  
 10 potentially having to defend the action in a different forum or because the dispute will remain  
 11 unresolved. *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1030, 1059 n.  
 12 6 (9th Cir. 2011). Expenses incurred in defending a lawsuit also do not amount to legal  
 13 prejudice. *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir.1996). Legal  
 14 prejudice does not result because the dispute remains unresolved, there is a threat of future  
 15 litigation, or a plaintiff may gain a tactical advantage by the dismissal. *Smith*, 263 F.3d at 976.  
 16 Instead, to have “legal prejudice,” there must be “prejudice to some legal interest, some legal  
 17 claim, some legal argument.” *Id.*

18                 Defendant Spaulding argues that it has expended significant effort in discovery and in  
 19 preparation of its motion for summary judgment. Plaintiff, on the other hand, has offered no  
 20 evidence or argument in response to Spaulding’s summary judgment motion. Spaulding asserts  
 21 that Plaintiff is simply attempting to avoid an adverse ruling on the motion for summary  
 22 judgment. Dkt. 53 pp. 3-6.

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1       Although Spaulding has suffered some prejudice in having incurred litigation expenses,  
2 Spaulding has not demonstrated that it suffered prejudice to some legal interest. Further, any  
3 prejudice related to legal expenses incurred in connection with the instant motion for summary  
4 judgment may be lessened because Spaulding may apply the information gained here in a  
5 subsequent action, should one be filed.

6       The record presented indicates that the timing of Plaintiff's motion to dismiss, while not  
7 ideal, is not due to any fault of Plaintiff or his current attorney. All indications are that the minor  
8 Plaintiff's mother, Shani Berry, failed to prosecute the matter on the minor's behalf, and then  
9 essentially abandoned the prosecution of this matter. See Dkt. 45. Spaulding's motion for  
10 summary judgment was filed a week subsequent to the appearance of new counsel. See Dkt. 31  
11 and 33. The motion to dismiss without prejudice was filed in response to the motion for  
12 summary judgment. Dkt. 47.

13       As the Tenth Circuit has observed in the context of Rule 41(a)(2):

14       The district court should endeavor to insure substantial justice is accorded to both parties.  
15 A court, therefore, must consider the equities not only facing the defendant, but also  
16 those facing the plaintiff; a court's refusal to do so is a denial of a full and complete  
17 exercise of judicial discretion. In a complex, emotional case such as this, it is critically  
18 important when considering a motion to dismiss, the court give the equities of the  
19 plaintiff the attention deserved.

20       *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir.1997). A district court is "obligated to  
21 consider the novelty of the circumstances" surrounding each case. *Ohlander*, 114 F.3d at 1531.  
22 As in *Ohlander*, this case presents unusual circumstances. Considering the equities facing both  
23 sides, the Court finds that Plaintiff should be permitted to voluntarily dismiss the case against  
24 Spaulding without prejudice and that Defendant would not suffer plain legal prejudice as a result  
of such a dismissal.

Defendant Spaulding's motion for summary judgment should be denied as moot.

## CONCLUSION

Accordingly, it is hereby **ORDERED**:

1. Plaintiffs' motion for voluntary dismissal without prejudice of claims against Defendant Spaulding Lighting, Inc. (Dkt. 47) is **GRANTED**. This action is **DISMISSED WITHOUT PREJUDICE** against Defendant Spaulding Lighting, Inc.
2. Defendant Spaulding Lighting, Inc's. Motion for Summary Judgment (Dkt. 33) is **DENIED** as **MOOT**

Dated this 5<sup>th</sup> day of February, 2013.

Robert J. Bryan

ROBERT J. BRYAN  
United States District Judge